

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE**

CARLOS DANIEL ACOSTA,
Plaintiff,

Case No. C14-420 RSM

v.

UNITED STATES OF AMERICA; JOHN
F. KERRY, Secretary of State; TERESA
BOBOTEK, Director, Seattle Passport
Agency; JEH JOHNSON, Secretary of the
Department of Homeland Security,
Defendants.

**ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

This matter comes before the Court on Plaintiff Carlos Acosta's motion seeking a temporary restraining order ("TRO"). Dkt. # 12. The Court heard oral argument on the motion on May 27, 2014, and conducted an additional telephonic conference with counsel on May 29, 2014. Because the Court finds that it lacks authority to grant the relief sought by Mr. Acosta, namely the return of his U.S. passport or a court order allowing him to re-enter the U.S. after traveling abroad, the motion will be denied.

**ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER**

II. BACKGROUND

Mr. Acosta filed this action against the named Defendants seeking a court issued declaration of U.S. citizenship under 8 U.S.C. 1503(a), and an order compelling the U.S. Department of State to either return Mr. Acosta's U.S. passport or, in the alternative, to order the U.S. Passport Office to issue a new U.S. passport. Dkt. # 1, ¶¶ A-C.

Although Mr. Acosta applied for and received a U.S. passport in August 2006, United States Customs and Border Patrol ("CBP") confiscated his passport at Phoenix International Airport on August 11, 2013, after he returned to the U.S. from a business trip to Mexico. *Id.* at ¶ 23. Mr. Acosta alleges that he is a U.S. citizen by birth. The Complaint details the circumstances surrounding Mr. Acosta's U.S. birth in Center, Colorado and his U.S. birth certificate. Mr. Acosta also has a Mexican birth registration and believes that CBP confiscated his passport on the basis that he was determined to be a non-national by the Department of State. *See id.* at ¶¶ 12-23.

Mr. Acosta filed the instant motion for a TRO on May 13, 2014, to secure the return of his passport so that he may freely travel during the pendency of the litigation. Defendants contend that the Court lacks authority to compel the Department of State to reinstate or re-issue Mr. Acosta's U.S. passport because the Department has revoked the passport after concluding that Mr. Acosta is a non-national.

III. DISCUSSION

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *see also McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012). As such, a preliminary injunction is "not intended as a substitute for relief on the merits of the case." *Roark v. Individuals of Federal Bureau of Prisons*, 2013 WL 2153944, *4 (E.D. Tex. May 16,

1 2013). “Otherwise, the normal procedures of litigation would be short-circuited by the simple
2 vehicle of trying a case by way of a motion for injunctive relief.” *Id.*; *see also Schrier v.*
3 *University of Co.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005). Here, as discussed above, Mr.
4 Acosta seeks a declaration of nationality and the return of his U.S. passport. The relief sought
5 in the instant motion for a TRO is coextensive with a merits determination because Mr. Acosta
6 effectively asks the Court to compel the Department of State to re-issue his passport.
7

8 Acosta provided documentary evidence to demonstrate that after his passport was
9 confiscated, he requested an explanation from the Department of State. Acosta Decl., Ex. C., p.
10 5. He received a letter stating that the reason for the revocation was a Mexican birth registration
11 in his name. *Id.*, Ex. D, p. 7. Acosta states that he was not provided an opportunity to contest
12 the adverse evidence. *Id.*, Ex. A, p. 2, ¶ 13.

13 The Department of State’s letter stated that revocation was pursuant to Section 51.62(b)
14 of Title 22 of the U.S. Code of Federal Regulations, which provides that a U.S. passport may be
15 revoked when it has been determined that the bearer is not a U.S. national. It also stated that an
16 investigation revealed a Mexican birth registration from Cuauhtemoc, Mexico that was issued
17 before the Colorado birth certificate as well as immunization records from Mexico. The letter
18 then noted that “you are not entitled to a hearing under Sections 51.70 through 51.74 of the
19 passport regulations in Title 22 of the Code of Federal Regulations. Title 22 Section 51.70
20 (b)(1) . . . states that a hearing is not provided in a case of an adverse passport action taken on
21 grounds of non-citizenship, such as in this case.” Dkt. # 12-1, pp. 8-9.
22

23 The Secretary of State is charged with “the administration and the enforcement of [the
24 Immigration and Nationality Act] and all other immigration and nationality laws relating to ...
25 the determination of nationality of a person not in the United States.” 8 U.S.C. § 1104(a). The
26 State Department has the authority to issue passports to United States citizens. 22 U.S.C. §§
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1 211a, 212; 22 C.F.R. § 51.2(a). Passports “have the same force and effect as proof of United
2 States citizenship as certificates of naturalization or of citizenship issued by the Attorney
3 General or by a court having naturalization jurisdiction.” 22 U.S.C. § 2705.

4 Title 8 U.S.C. § 1503(a) confers subject matter jurisdiction on district courts. It states:

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6 If any person who is within the United States claims a right or privilege
7 as a national of the United States and is denied such right or privilege by
8 any department or independent agency, or official thereof, upon the
9 ground that he is not a national of the United States, such person may
10 institute an action under the provisions of [the Declaratory Judgment
11 Act, 28 U.S.C. § 2201,] against the head of such department or
12 independent agency for a judgment declaring him to be a national of the
13 United States, except that no such action may be instituted in any case if
14 the issue of such person's status as a national of the United States (1)
15 arose by reason of, or in connection with any removal proceeding under
16 the provisions of this chapter or any other act, or (2) is in issue in any
17 such removal proceeding. An action under this subsection may be
18 instituted only within five years after the final administrative denial of
19 such right or privilege and shall be filed in the district court of the United
20 States for the district in which such person resides or claims a residence,
21 and jurisdiction over such officials in such cases is conferred upon those
22 courts.

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24 The revocation of a passport on the basis of non-citizenship is a denial of a “right or privilege
25 as a national of the United States,” giving rise to a claim under § 1503(a). *See, e.g., Whitehead*
26 *v. Haig*, 794 F.2d 115, 119 (3d Cir. 1986). “A suit under section 1503(a) is not one for judicial
27 review of the agency's action. Rather, section 1503(a) authorizes a *de novo* judicial

1 determination of the status of the plaintiff as a United States national.” *Richards v. Sec’y of*
2 *State*, 752 F.2d 1413, 1417 (9th Cir. 1985). In an action under § 1503(a), the “burden of proof
3 is on the claimant to prove that [he or] she is an American citizen.” *De Vargas v. Brownwell*,
4 251 F.2d 869, 871 (5th Cir. 1958). Once the district court determines, on the evidence
5 presented, whether the plaintiff either is, or is not a U.S. national, the inquiry is at an end. *See*
6 *Hizam v. Kerry*, 747 F.3d 102, (2d Cir. 2014) (concluding that the only remedy provided by
7 Section 1503(a) is a declaration that the plaintiff is a U.S. national).
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9 The above legal framework is important because Acosta’s motion frames the issue
10 differently. Although the Complaint identifies § 1503(a) as the primary source of this court’s
11 jurisdiction, the motion identifies the denial of pre-revocation due process as the central merits
12 issue to be considered at the preliminary relief stage. Acosta relies on *Magnuson v. Baker*, 911
13 F.2d 330 (9th Cir. 1990) for the proposition that under Ninth Circuit precedent, the Secretary
14 must grant a passport holder an opportunity to be heard before he revokes a passport where the
15 Secretary has adjudicated the issue of citizenship. *Id.* at 335. While not mentioned in Acosta’s
16 brief, this holding in *Magnuson* has been declared superseded by statute (8 U.S.C. § 1504) by
17 *Mondaca-Vega v. Holder*, 718 F.3d 1075, 85 Fed. R. Serv. 3d 746 (9th Cir. 2013), reh’g en
18 banc granted, 735 F.3d 1093 (9th Cir. 2013), *Atem v. Ashcroft*, 312 F. Supp. 2d 792 (E.D. Va.
19 2004), and *Hizam v. Clinton*, 2012 WL 4220498 (S.D. N.Y. 2012). Title 8 U.S.C. § 1504(a)
20 expressly provides for notifying a passport holder about procedures for obtaining post-
21 revocation review, but does not mandate pre-revocation review (contrary to *Magnuson*). The
22 statute reads as follows:
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24 The Secretary of State is authorized to cancel any United States passport
25 or Consular Report of Birth, or certified copy thereof, if it appears that
26 such document was illegally, fraudulently, or erroneously obtained from,
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1 or was created through illegality or fraud practiced upon, the Secretary.
2 The person for or to whom such document has been issued or made shall
3 be given, at such person's last known address, written notice of the
4 cancellation of such document, together with the procedures for seeking
5 a prompt post-cancellation hearing. The cancellation under this section
6 of any document purporting to show the citizenship status of the person
7 to whom it was issued shall affect only the document and not the
8 citizenship status of the person in whose name the document was issued.

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10 8 U.S.C. 1504(a). Thus, *Magnuson* is not good law on this point.

11 At oral argument, Acosta argued that even if no pre-revocation hearing is warranted
12 under 8 U.S.C. 1504, the State Department must still comply with the notice and post-
13 revocation procedures provided for by the statute. He contended that Mr. Acosta was never told
14 that he had a right to a prompt post-revocation hearing, in violation of § 1504. It is on that
15 basis, he argued, that the Court may determine that the revocation was unlawful. However, the
16 Department of State's passport regulations make clear that although a passport holder may seek
17 a post-revocation hearing under some circumstances, where the Department of State revokes a
18 passport for non-nationality, no post-revocation hearing will be provided. *See* 22 C.F.R. §
19 51.70(a) & (b)(1).
20

21 Although the letter provided to Acosta did not set out a procedure for a "prompt" post-
22 revocation hearing, it stated that Acosta may utilize a § 1503(a) district court action to obtain a
23 citizenship determination. Mr. Acosta exercised that right, filed suit, and now has the
24 opportunity to have the district court adjudicate his citizenship status. Mr. Acosta's Complaint
25 did not specifically challenge 22 C.F.R. §§ 51.70(a) & (b)(1) as contrary to 8 U.S.C. 1504.
26 Rather, his Complaint identified 8 U.S.C. § 1503(a) as the primary cause of action. And under a
27 § 1503(a) action, the district court only has jurisdiction to make a de novo adjudication of

1 citizenship. *See Hizam v. Kerry*, 747 F.3d 102, (2d Cir. 2014) (reversing district court because,
2 among other things, it exceeded the scope of its authority on a § 1503(a) action).

3 Acosta's motion for a TRO to obtain a passport is akin to seeking a writ of mandamus
4 compelling Defendants to provide him with a document that has been revoked. Title 28 U.S.C.
5 § 1361 gives the district court jurisdiction to issue a writ of mandamus "to compel an officer of
6 employee of the United States or any agency thereof to perform a duty owed to the plaintiff."
7 "Mandamus is an extraordinary remedy and is available to compel a federal official to perform
8 a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is
9 nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no
10 other adequate means is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003)
11 (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998). Mr. Acosta has made no such
12 showing, and has cited no authority for the proposition that the Court may compel the
13 Department of State to re-issue his passport prior to making a citizenship determination on the
14 merits.¹ Accordingly, the motion for a TRO will be denied.
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16 IV. CONCLUSION

17 Having considered the motion, the response, oral argument, the declarations and
18 attached exhibits, and the balance of the file, the Court hereby finds and ORDERS:
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21 ¹ Mr. Acosta also filed a "Notice" (Dkt. # 19) stating that he had been issued a
22 Mexican passport to facilitate scheduled business travel to the United Kingdom. In
23 light of the Mexican passport he requested narrower relief from the Court—a
24 judicial order permitting him re-entry into the United States. Defendants filed a
25 written "Response" (Dkt. # 20) arguing that discretionary authority to grant
26 advance parole is vested exclusively with the Department of Homeland Security.
27 *See* 8 U.S.C. § 1182(d)(5)(A); *see also Hassan v. Chertoff*, 593 F.3d 785, 790 (9th
Cir. 2010). The Court held a telephonic hearing to discuss the matter and upon
receiving no countervailing authority from Plaintiff, agreed with Defendants that
the Court lacked authority to grant advanced parole under the circumstances of
this case.

1 (1) Plaintiff's Motion for a Temporary Restraining Order (Dkt. # 12) is DENIED.
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3 Dated this 29th day of May 2014.
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6 RICARDO S. MARTINEZ
7 UNITED STATES DISTRICT JUDGE
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